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# In the Supreme Court of the United States

OCTOBER TERM, 1939

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

GODFREY HAMMEL AND PEARL HAMMEL

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above-entitled cause on January 10, 1940.

### OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 10) is unreported. The opinion of the Circuit Court of Appeals is reported in 108 F. (2d) 753.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 10, 1940. The jurisdiction

of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether a foreclosure sale constitutes a "sale" within the meaning of Sections 23 (j) and 117 (d) of the Revenue Act of 1934, limiting the deduction of capital losses.

## STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (j) CAPITAL LOSSES.—Losses from sales or exchanges of capital assets shall be allowed only to the extent provided in section 117 (d).
>
> * * * * *
>
> [U. S. C., Title 26, Sec. 23.]
>
> SEC 117. CAPITAL GAINS AND LOSSES.
>
> * * * * *
>
> (d) LIMITATION ON CAPITAL LOSSES.—Losses from sales or exchanges of capital assets shall be allowed only to the extent of $2,000 plus the gains from such sales or exchanges. * * *
>
> * * * * *
>
> [U. S. C., Title 26, Sec. 101.]

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

ART. 117–2. *Limitations on capital gains and capital losses.*— * * *

Section 117 (d) provides a limitation on deductions for capital losses affecting all taxpayers including corporations, that is, losses from sales or exchanges of capital assets shall be allowed as deductions only to the extent of $2,000 plus the gains from such sales and exchanges. * * *

STATEMENT

The facts, as found by the Board of Tax Appeals (R. 10–11), are substantially as follows:

During the years 1926 to 1930, both inclusive, the taxpayer, Pearl Hammel, invested $4,998.03 in a speculative land syndicate, which syndicate purchased on land contract 80 acres of land in Oakland County, Michigan, known as "The Adams Farm", the purchase price being $96,000. The syndicate made a down payment of $20,000, and thereafter approximately $4,000 additional was paid on the principal, leaving an unpaid balance of approximately $72,000, plus accrued interest and state and county taxes for several years. (R. 10.)

One Charles L. Bruce acted as trustee for the purchasers (the syndicate members). (R. 10.)

Because of the general financial condition of the country, the value of the land, and other lands in Oakland County, Michigan, depreciated; by 1934 the land referred to had decreased in value to the value of farm land and was worth approximately $8,000. (R. 10.)

The taxpayer, Pearl Hammel, and other members of the syndicate, were unable to meet the payments called for by the contract and were in default, whereupon the vendor, Mrs. Julia Adams, commenced foreclosure proceedings in Chancery in the Oakland County Circuit Court and obtained a decree of foreclosure without any equity of redemption. The decree was affirmed by a decision of the Michigan Supreme Court in 1934, pursuant to which the property was sold on March 26, 1934, by sheriff's deed to Mrs. Adams. Mrs. Adams also obtained a deficiency judgment against all of the members of the syndicate, jointly and severally, in the amount of approximately $79,000. The taxpayer, Pearl Hammel, was insolvent, and in order to be relieved of the deficiency judgment, filed a voluntary petition in bankruptcy in the District Court of the United States for the Eastern District of Michigan, Southern Division, on April 26, 1934, and was duly discharged in bankruptcy on July 28, 1934. (R. 10.)

The sole asset of the syndicate was the property herein referred to. (R. 11.)

The respondents are husband and wife, living together, and filed a joint income tax return for the taxable year 1934 in which they claimed a loss deduction of $4,998.03. The Commissioner held that the loss was a capital net loss, and accordingly disallowed all but $2,000 of the deduction claimed, in accordance with Section 117 (d) of the Revenue Act of 1934, *supra*. (R. 3, 7.)

The Board of Tax Appeals held that the loss sustained did not result from a "sale" or "exchange," and was therefore not subject to the limitation prescribed for capital losses. The court below affirmed.

### SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the foreclosure sale was not a "sale" within the meaning of Sections 23 (j) and 117 (d) of the Revenue Act of 1934.

2. In failing to hold that the loss sustained by the taxpayer upon the foreclosure sale was subject to the limitation prescribed by Sections 23 (j) and 117 (d) of the Revenue Act of 1934.

3. In affirming the decision of the Board of Tax Appeals.

### REASONS FOR GRANTING THE WRIT

The Circuit Court of Appeals held that a foreclosure sale was not a "sale" within the meaning of Section 117 (d) of the Revenue Act of 1934, *supra,* limiting the loss deduction allowed upon sales or exchanges of capital assets, and accordingly allowed the deduction in full. The decision below is in direct conflict with *Commissioner* v. *Electro-Chemical Engraving Co.* (C. C. A. 2d), decided March 18, 1940, not yet officially reported, but may be found in 1940 Prentice-Hall, Vol. 4, p. 62,634.[1] In that case, in holding that a foreclosure

[1] The *Electro Chemical* case involved a foreclosure sale under a purchase money mortgage while in the instant case

sale constituted a sale within the meaning of Section 117 (d) of the Revenue Act of 1934, the Circuit Court of Appeals for the Second Circuit recognized that its decision was in conflict with the decision below and with *Commissioner* v. *Freihofer*, 102 F. (2d) 787 (C. C. A. 3d), upon which the court below relied, and stated that "We feel compelled to differ with the foregoing decisions".

The question presented by the instant case is of considerable importance in the administration of the revenue laws. Similar questions are involved in five cases now pending before the Circuit Courts of Appeals.[2]

CONCLUSION

Wherefore it is respectfully submitted that this petition should be granted.

FRANCIS BIDDLE,
*Solicitor General.*

APRIL, 1940.

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a land purchase contract was foreclosed. However, that distinction appears to be entirely immaterial.

[2] *Bookstein* v. *Commissioner* (B. T. A. unreported opinion of September 23, 1939), now pending in the Circuit Court of Appeals for the Sixth Circuit; *Nebraska Bridge Supply & Lumber Co.* v. *Commissioner*, 40 B. T. A. 40, now pending in the Circuit Court of Appeals for the Eighth Circuit; *Jones* v. *Commissioner* (B. T. A. unreported opinion of September 30, 1939), now pending in the Circuit Court of Appeals for the Eighth Circuit); *Coggan* v. *Commissioner* (B. T. A. unreported opinion of October 27, 1939), now pending in the Circuit Court of Appeals for the First Circuit; *Hill* v. *Commissioner*, 40 B. T. A. 376, now pending in the Circuit Court of Appeals for the Sixth Circuit.

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